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No. 08-333

In the Supreme Court of the United States

MARY ANN ARNOLD; ELSIE MAHLER SCHARFF, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF AMERICA, N.A.; AND BANK OF AMERICA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals for the Eighth Circuit erred when, in keeping with the plain language of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), this Court's recent and controlling decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), and a uniform body of federal and state cases, it held that SLUSA preempted Petitioners' state law class action?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All of the parties are listed in the caption. The parent company of Respondent Bank of America, N.A., is N.B. Holdings Corporation, a wholly owned subsidiary of Respondent Bank of America Corporation ("BAC"). BAC is a publicly traded company; it has no parent company; and there is no publicly held corporation that owns ten percent or more of BAC.

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INTRODUCTION

The petition attempts to craft an issue for this Court's review where none exists. The opinion below and in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008), ably demonstrate that there is no conflict in the law concerning the preemptive effect of the federal Securities Litigation Uniform Standards Act of 1998 ("SLUSA") upon class actions such as this one.

This Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80, 85-86 (2006), makes clear that, subject to certain express statutory exceptions not relevant here, SLUSA preempts the use of the class action device in cases where a complaint asserts state law claims and includes allegations of misrepresentations and omissions of material facts or the use of a deceptive device or contrivance that "coincide" with or "touch[]" upon the purchase or sale of a covered security. *Dabit* further makes clear that SLUSA must be enforced as written by Congress—without any judicially-created exceptions or limitations.

Numerous courts have applied *Dabit*'s mandate to a wide variety of state law class action claims implicating the purchase and sale of federal securities. This includes six cases that hold that SLUSA preempts state law class action claims brought in this *precise* context—by trust beneficiaries asserting state law claims for breaches of fiduciary duties based on alleged misstatements and omissions of material facts concerning the investment of trust assets in mutual funds. There are no cases to the contrary. Moreover, no court has ever held, as Petitioners argue, that SLUSA's

preemptive effect is limited to those cases where there are allegations of "market manipulation" or stock price "inflation." Pet. 12-20. Nor has any court construed SLUSA to require that the plaintiff allege that he or she personally made an investment decision to buy, sell, or hold any security in reliance on an alleged misrepresentation. Indeed, such a narrow reading of statutory "in connection with" language was rejected by this Court in *Dabit* and *SEC v. Zandford*, 535 U.S. 813, 813-14 (2002).

Nor is there any reason to think, as Petitioners would have it, that the decision below—or any of the many others whose reasoning it relies on—presents some grave threat to state trust law in general or their state law claims in particular. SLUSA's express federal statutory directive only precludes use of the class action device for those transactions or claims that fall within its ambit. The application of the statutory text to this particular complaint does not impact, in any respect, the substance of state trust law or individual state law claims. *See, e.g., U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 843-45 (9th Cir. 2007) (noting that would-be plaintiffs can avoid SLUSA "completely" by omitting class allegations and bringing claims in "groups of 50 or less").

In reality, therefore, Petitioners are asking this Court to grant review in a case where (1) there are recent controlling decisions by this Court which resolve the questions presented by the Petition and (2) this Court and lower courts uniformly have rejected the arguments that Petitioners now advance.

The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

This case is one of multiple, overlapping class actions filed by Petitioners' attorneys on behalf of a revolving group of named plaintiffs and a putative class of beneficiaries with trust assets invested in Nations Funds, a family of mutual funds managed by an affiliate of Bank of America, N.A. and Bank of America Corporation (collectively, the "Bank"). Pet. App. 1.

In each of these actions, the named plaintiffs alleged that they are beneficiaries of trust accounts for which the Bank serves as trustee. They further alleged that the Bank has discretion to decide how to invest trust assets and that Bank frequently exercised that discretion to invest trust assets in nationally traded securities, including mutual funds. According to the complaints, the Bank allegedly breached its contractual and fiduciary duty as trustee by investing trust assets in shares of the Nations Funds and concealing or misrepresenting material facts concerning these Nations Funds investments. *Id.*

The procedural history of these various actions is well-chronicled in *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558, 561-63 (E.D. Mo. 2006), *aff'd*, 526 F.3d 1122 (8th Cir. 2008). The focus here is limited to the procedural history of this case.

Petitioners' original complaint asserted class-wide claims based on various federal securities laws, including Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-

5; and Sections 11 and 12 of the Securities Act, 15 U.S.C. §§ 77k and 77l. R. 1.[1] It also asserted class-wide claims based on state law for breach of contract, breach of fiduciary duty, unjust enrichment, and violations of California and Missouri statutes. *Id.*

The Bank moved to dismiss the original complaint. R. 18. In response, Petitioners filed an amended complaint that abandoned their federal securities claims but continued to assert the same state law claims on behalf of themselves and the same putative nationwide class. R. 23.

After Petitioners abandoned their federal securities claims, the Bank moved to dismiss Petitioners' amended complaint on various grounds, including SLUSA preemption. R.41, 42. The district court heard the Bank's motion to dismiss on August 1, 2007, R. 56, and, on August 29, 2007, entered a memorandum and order dismissing the Petitioners' state law class action claims. Pet. App. 5-29 (district court opinion). The district court thoroughly analyzed Petitioners' charging allegations and the relevant case law, including its prior decision in *Siepel*, 239 F.R.D. 567-72. *Id.* Because the "crux" of Petitioners' amended complaint concerned alleged misstatements and omissions of fact coinciding with the investment of trust assets in Nations Funds, the court held that SLUSA applied and preempted Petitioners' state law class action claims. *Id.*

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1 "R. __" refers to entries on the district court docket.

On October 1, 2007, the court issued an order pursuant to Fed. R. Civ. P. 54(b), directing the entry of a final judgment on the state law class action claims asserted by Petitioners on behalf of themselves and a putative class of beneficiaries with trust assets invested in the Nations Funds. R. 64. Judgment was entered that day. R. 65. Petitioners timely appealed the dismissal of their state law class action claims.

On appeal, Petitioners argued that the district court (1) misapprehended the scope of SLUSA by refusing to follow cases that concern the elements of an implied private action under section 10(b) of the the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5); and (2) failed to properly distinguish this case from *Siepel*, 239 F.R.D. at 567-72, and other cases addressing SLUSA's preemptive reach. The Court of Appeals, in turn, examined Petitioners' amended complaint and the relevant case law, including its decision affirming the dismissal of *Siepel*, 526 F.3d at 1124-25. The Court of Appeals concluded that (1) Petitioners' pleading asserted a state law class action that described misstatements and omissions of material facts and the use of a deceptive and manipulative device or contrivance, thereby triggering SLUSA and (2) Petitioners failed to distinguish this action from *Siepel*. Pet. App. 1-4.

REASONS FOR DENYING THE WRIT

I. The Decision Below Applying SLUSA To Petitioners' State Law Class Action Complaint Is Based On Recent Controlling Decisions Of This Court And A Uniform Body Of Federal And State Cases Rejecting Petitioners' Arguments.

A. There Is No Controversy Or Conflict Concerning The Factors Necessary For SLUSA Preemption.

More than a decade ago, Congress became concerned that the class action device was being misused in securities cases. That concern prompted Congress to enact the Private Securities Litigation Reform Act of 1995 (the "1995 Reform Act"), 15 U.S.C. §§ 77z-1 and 78u-4. *See Dabit*, 547 U.S. at 81-82. The 1995 Reform Act imposes, among other things, heightened pleading requirements and discovery stays in actions brought pursuant to section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). *Id.* at 82.

The 1995 Reform Act, however, produced certain "unintended consequence[s]" for securities class actions nationwide. *Dabit*, 547 U.S. at 82. "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court." *Id.* To forestall this end run around federal securities laws, Congress enacted SLUSA. *Id.* SLUSA compels the dismissal of class actions asserting state law theories of liability that arise in

connection with the purchase or sale of covered securities. *Id.*

In keeping with express federal policy, therefore, SLUSA preemption does not turn on the label attached to, or the specific elements of, the causes of action alleged in a particular complaint. Nor does SLUSA preemption depend on whether a particular plaintiff could bring a private action under federal securities laws. SLUSA preemption instead applies whenever the statute's four-part test is satisfied. That is, with very limited, express exceptions, SLUSA preemption applies any time the lawsuit: (1) is a "covered class action"; (2) asserts a claim based on state law; (3) involves a "covered security"; and (4) alleges that the defendant misrepresented or omitted a material fact or employed any manipulative or deceptive device "in connection with the purchase or sale of a covered security." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1092 (11th Cir. 2002) (applying SLUSA to amended complaint asserting class-wide claims for breach of contract, breach of fiduciary duty, misrepresentation, suppression, unjust enrichment, and negligence arising out of sale of mutual fund shares and failure to disclose excessive fees); *Saxton*, 494 F.3d at 843-45 (claims of lenders with security interest in stock); *Sofonia v. Principal Life Insurance Co.*, 465 F.3d 873, 879-80 (8th Cir. 2006) (claims concerning approval of an insurance company "demutualization" plan).

B. There Is No Controversy Or Conflict Concerning The Meaning Of SLUSA's "In Connection With" Language Or The Scope Of SLUSA Preemption.

The opinions below make clear that Petitioners' amended complaint satisfies each one of SLUSA's requirements. Pet. App. 1-4, 5-10, 11-22. First, Petitioners' amended complaint indisputably asserts a "covered class action"—*i.e.*, a class action that seeks damages on "behalf of more than 50 persons or prospective class members," 15 U.S.C. § 78bb(f)(5)(B) (definition of a "covered class action"). Pet. App. 1-2. Second, Petitioners' amended complaint likewise asserts class action claims based on state law, 15 U.S.C. § 78bb(f)(1). Pet. App. 1-2, 5-10. Third, Petitioners' amended complaint involves the purchase and sale of a "covered security"—*i.e.*, shares of investment companies registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (and commonly referred to as "mutual funds"). 15 U.S.C. § 78bb(f)(5)(E).

SLUSA's fourth requirement—allegations of misrepresentations, omissions, deception, or manipulation "in connection with" the purchase or sale of a covered security—is met here as well. To begin with, Petitioners' amended complaint plainly accuses the Bank of false statements, misleading statements, and failures to disclose material information concerning the use of some of Petitioners' trust fund assets to purchase shares of Nations Funds. Pet. App. 2-4 (noting that Petitioners' express allegations accused the Bank of

false statements, misleading statements, and failures to disclose; that Petitioners' counsel conceded at oral argument that Petitioners' class action directly challenges the adequacy of disclosures made by the Bank to trust beneficiaries; and that the gravamen or "substance" of the transactions and conduct alleged was identical to the deceptive and manipulative scheme alleged in *Siepel*, 239 F.R.D. at 567-72, *aff'd*, 526 F.3d at 1127-28).

Petitioners nevertheless contend that the Court of Appeals for the Eighth Circuit and the district court erred grievously when each court concluded that the amended complaint alleged misrepresentations, omissions, deception and manipulation by the Bank "in connection with" the purchase and sale of Nations Funds shares. Pet. 9-20. Specifically, Petitioners argue that SLUSA's "in connection with" language must be construed narrowly to cover *only* those deceptive and manipulative statements, acts, and omissions that inflate stock prices, manipulate securities markets, or otherwise induce a private plaintiff to make an investment decision to buy, sell, or hold a covered security. *Id.* Petitioners argue that the Court of Appeals' construction of the statutory phrase "in connection with" is based on an improper and overbroad reading of this Court's decision in *Dabit* and conflicts with decisions of the Courts of Appeals for the Third, Seventh, Ninth, and Tenth Circuits. *Id.*

A fair reading of the relevant cases, however, demonstrates that there is no controversy or conflict concerning the construction of the statutory phrase "in connection with"; nor is there any conflict or

controversy concerning the scope of SLUSA preemption. Although Petitioners firmly disavow it, their allegations concerning the Bank's purported misrepresentations, omissions, and alleged deceptive scheme plainly satisfy SLUSA's "in connection with" requirement. Unanimous and controlling precedent so provides.

1. This Court's Construction In *Dabit* Of The Statutory Phrase "In Connection With" Controls The Outcome Of This Case And Leaves Nothing For This Court To Review.

In *Dabit*, this Court construed the "in connection with" language used in SLUSA and held that this statutory phrase should receive the same "broad construction" historically given to the "in connection with" language of Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5). *Dabit*, 547 U.S. at 80, 85-86. According to *Dabit*, the broad, historic construction of this phrase extends "flexibly" to cover *any* deceptive or manipulative practices "'touching'" the purchase or sale of a covered security. *Id.* (quoting *Superintendent of Insurance of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971); *United States v. O'Hagan*, 521 U.S. 642, 651, 658 (1997); *Zandford*, 535 U.S. at 819-20).

Moreover, in re-affirming this historic construction of the phrase "in connection with," *Dabit* also considered and rejected an alternate narrow reading of "in connection with" that was substantially similar to the reading advanced by

Petitioners here—*i.e.*, a reading that would limit the scope of SLUSA based on the elements necessary to bring an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Id.* (refusing to read SLUSA's "in connection with" language narrowly based on the prudential limitations placed on implied private rights under *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)). Like Petitioners here, the *Dabit* respondents contended that it would be illogical and incongruous to apply SLUSA in cases where the plaintiffs' class action claims did not satisfy the elements necessary to support an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Dabit*, 547 U.S. at 80, 85-86. (citing *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005)).

This Court disagreed with the *Dabit* respondents. The Court reversed the Second Circuit's opinion adopting the respondents' narrow construction of SLUSA and opted for the Seventh Circuit's much broader construction of the statute in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005). 547 U.S. at 83-88. By embracing and affirming the Seventh Circuit's reasoning in *Kircher*, this Court made it clear that SLUSA's preemptive effect cannot be narrowed by construing the statute's "in connection with" language in light of the judicially-created elements necessary to support an implied private right of action under Section 10(b) of the Exchange Act and Rule 10b-5. *Dabit*, 547 U.S. at 84 (refusing to apply limitations on private party standing adopted in *Blue Chip Stamps* to SLUSA's "in connection with" requirement because *Blue Chip Stamps*' private party standing rules stemmed from

"prudential" judicial "policy" concerns and not a legal construction of words "in connection with"). Rather, consistent with *Dabit*, SLUSA's preemptive reach extends to state law class action claims, "regardless of whether federal securities laws furnish a remedy to a plaintiff." *Potter v. Janus Investment Fund*, 483 F. Supp. 2d at 692, 702 (S.D. Ill.), *appeal dismissed*, 495 F.3d 366 (7th Cir. 2007); *Disher v. Citigroup Global Markets, Inc.*, 487 F. Supp. 2d 1009, 1018 (S.D. Ill. 2007) (the fact that the plaintiffs lack standing to sue "does not take such claims out of the scope of SLUSA").

According to *Dabit*, nothing in the language of the statute suggested that Congress intended such a narrow reading of "in connection with" and, as *Dabit* further observed: "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision." *Dabit*, 547 at 85.

Thus, under *Dabit*, the statutory phrase "in connection with" does not require, as a prerequisite to SLUSA's application, allegations that a plaintiff made any investment decision to buy, sell, or hold any security in "reliance" on an alleged misrepresentation, omission, or act of deception or manipulation; nor does it require allegations of "fraud on the market," "market manipulation," or "stock inflation." *Compare Dabit*, 547 U.S. at 80, 85-86 *with* Pet. 6-20. To the contrary, in *Dabit*, the Court held SLUSA's "in connection with" requirement can be satisfied even where the plaintiff played *no* role in the purchase or sale of the security and thus could not bring a private cause of action under federal securities laws. *See Dabit*, 547 U.S. at

83-88; *Zandford*, 535 U.S. at 819-25. As the Court explained it:

> Under our precedents, it is enough that the fraud alleged "*coincide*" with a securities transaction—whether by the plaintiff *or by someone else*. . . . The requisite showing, in other words, is "deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller."

547 U.S. at 85 (citations omitted) (emphasis added). *See also O'Hagan*, 521 U.S. at 651, 658 (same); *Zandford*, 535 U.S. at 819-20 (same).

Zandford, 535 U.S. 813, one of the precedents cited with approval in *Dabit*, also illustrates why SLUSA's "in connection with" requirement does not turn on the plaintiff's status or identity; whether misrepresentations or omissions resulted in market manipulation, stock price inflation, or the making of an investment decision to purchase, sell, or hold a covered security; or the plaintiff's ability to bring an action under federal securities laws. In *Zandford*, the SEC brought a civil action based on Section 10(b) and Rule 10b-5 against a broker whose clients had given him discretion to manage their account and a general power of attorney to make stock transactions on their behalf. Over time, the broker sold all the clients' stockholdings but diverted the sales proceeds to his own accounts. The Fourth Circuit reversed a judgment against the broker, opining that the sales of the securities had been "merely incidental" to the fraud and that the scheme had not involved the "'manipulation of a particular security.'" *Zandford*,

535 U.S. at 817 (summarizing the Fourth Circuit's reasoning).

This Court rejected the Fourth Circuit's analysis, holding that the broker's scheme occurred "in connection with" the sale of the securities. According to *Zandford*, the sales of securities and the broker's misrepresentations and omissions could not be viewed as "independent events." *Id.* at 820. The broker's misrepresentations and omissions to his clients "coincided with the sales themselves," and each transaction was "deceptive because it was neither authorized by, nor disclosed to" the broker's clients. *Id.* at 820-21.

In sum, the recent and controlling precedents of this Court establish that SLUSA's "in connection with language must be construed broadly and flexibly to encompass any deceptive or manipulative practice that coincides with or touches on the purchase or sale of a covered security and that the statutory phrase may not be narrowed by reference to judicially created elements of an implied private right of action under Section 10(b) and Rule 10b-5 of the Exchange Act. Given this, it is well settled by this Court that misrepresentations, omissions, and deceptive or manipulative conduct can occur "in connection with" the purchase or sale of a covered security even when: (1) the plaintiff did not purchase or sell the security at issue; (2) the plaintiff could not bring an implied private right of action under Section 10(b) or Rule 10b-5; and (3) the alleged purchase or sale is made by another, such as a broker or investment adviser, without the alleged victim making any investment decision in reliance on the market or any specific misstatement, omission, or deceptive or manipulative act.

2. Following *Dabit*, Federal And State Courts Uniformly Have Held That SLUSA Preempts Class Actions Brought In This Precise Context.

In this case and five others, federal and state courts have held that SLUSA preempts state law class action claims brought in this *precise* context—by trust beneficiaries complaining about trust investments in proprietary mutual funds—notwithstanding the respective plaintiffs' contentions, identical to those made here, that SLUSA could not be applied because they had no direct connection to the transaction involving the mutual fund.[2]

In *Spencer*, for example, the court carefully examined *Dabit*, *Zandford*, and several additional cases construing SLUSA and concluded that SLUSA's "in connection with" requirement was satisfied by allegations that a trustee-bank had violated state fiduciary duties when it made alleged misstatements and omissions to its clients concerning the investment of trust assets in shares of various affiliated mutual funds. 2006 WL

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2 *Spencer v. Wachovia Bank, N.A.*, No. 05-81016, 2006 WL 3408043 (S.D. Fla. May 10, 2006); *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558 (E.D. Mo. 2006), *aff'd*, 526 F.3d 1122 (8th Cir. 2008); *Rabin v. JPMorgan Chase Bank, N.A.*, No. 06 C 5452, 2007 WL 2295795 (N.D. Ill. Aug. 3, 2007); *Segal v. Fifth Third Bank, N.A.*, No. 1:07-cv-348, 2008 WL 819290 (S.D. Ohio Mar. 25, 2008), *appeal pending*; and *Wells Fargo Bank, N.A. v. Superior Court of San Francisco County*, 159 Cal. App. 4th 381 (Cal. App. 1st Dist. 2008).

3408043, at *3. In particular, *Spencer* found the requisite connection to a securities transaction sufficient for SLUSA preemption, even though the plaintiff-beneficiaries did not themselves purchase the securities or control the actual investment decision. *Id.* at *7.

Siepel reached the same conclusion based on allegations that mirror those made in this case. 239 F.R.D. at 567-70, *aff'd*, 526 F.3d at 1126-27. As the court put it: "Because both *Dabit* and [other SLUSA cases] focus on the conduct of the defendants and not the identity of the plaintiffs, the Court holds that SLUSA may preempt the state law claims, despite the fact that Plaintiffs are beneficiaries, and not purchasers, sellers, or holders, of the financial accounts at issue." *Id.* at 569.

Rabin, 2007 WL 2295795, at **5-7 & nn. 4 & 5, and *Segal*, 2008 WL 81920, at **3-7, also considered mutual fund transactions virtually identical to the ones involved here and expressly rejected arguments for avoiding SLUSA preemption that are indistinguishable from those made here. Relying on *O'Brien v. Continental Illinois National Bank and Trust Co. of Chicago*, 593 F.2d 54 (7th Cir. 1979), and many of the other cases cited by Plaintiffs in this case, the *Rabin* and *Segal* plaintiffs asserted that SLUSA's "in connection with" requirement was not met "because they lacked investment authority and were beneficiaries rather than purchasers or sellers." *E.g.*, *Rabin*, 2007 WL 2295795, at *7. In each case, the court held that reliance on the plaintiffs' pre-*Zandford* and pre-*Dabit* cases was "misplaced," noting that *Zandford* "belies Plaintiffs' contention that . . . the plaintiff must have possessed

investment authority" in order to satisfy SLUSA's "in connection with" requirement. *Id.*

Most recently, in *Wells Fargo Bank*, the California Court of Appeal likewise examined class action allegations regarding the same type of trust asset investments in mutual funds and concluded that SLUSA preempts state law class action claims similar to those made in this case. In a thorough opinion tracking *Dabit*, *Zandford*, and many of the cases cited by the Petition, the California court squarely rejected each of Plaintiffs' arguments. *Id.*

3. Cases Applying SLUSA In Other Contexts Confirm That, In The Wake Of *Dabit*, There Is No Genuine Conflict Or Controversy With Respect To Construction Of SLUSA's "In Connection With" Language.

The cases cited above involving class actions under state trust law are only part of a uniform body of precedents that, consistent with *Dabit*, have construed SLUSA's "in connection with" requirement broadly and applied SLUSA to class action claims asserting breaches of fiduciary duties, breaches of contract, unjust enrichment, and state statutory violations based on alleged failures to disclose. *See, e.g.*, *Saxton*, 494 F.3d at 843-45 (applying SLUSA to the putative class action claims of lenders, notwithstanding arguments that the lenders did not make any investment decision to purchase, sell, or hold the securities in question); *Sofonia*, 465 F.3d at 879-80 (applying SLUSA to claims arising out of an insurance company "demutualization" plan); *Behlen*, 311 F.3d at 1094 (applying SLUSA to claims that

defendants breached fiduciary duties by selling "Class B" mutual fund shares and failing to disclose excessive fees); *Beckett v. Mellon Investor Services, LLC*, No. C06-5245 FDB, 2006 WL 3249189, at **4-5 (W.D. Wash. Nov. 8, 2006) (same); *Broadhead Ltd. Partnership v. Goldman Sachs Co.*, No. Civ. A. 206CV009TJW, 2007 WL 951623, at **3-5 (E.D. Tex. Mar. 26, 2007) (same where defendants allegedly failed to disclose fees charged in connection with bond transactions for discretionary accounts under defendants control). The decision below fits comfortably within this unbroken line of cases.

In fact, there are no cases cited in the Petition (or otherwise) that demonstrate a genuine conflict or controversy concerning the construction of SLUSA's "in connection with" language and the scope of SLUSA preemption.

The cases cited in the Petition that find SLUSA applicable to state law class action complaints all recognize that, consistent with *Dabit*, a state law class action complaint falls within SLUSA's ambit whenever SLUSA's four elements are satisfied. And none of them holds, or even suggests, that SLUSA applies only to those class action claims that are based on allegations of fraud on the market, price inflation, or manipulation of federal securities markets. *Compare* Pet. 14-16 *with Saxton*, 440 F.3d at 836-39, *and Anderson v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 521 F.3d 1278 (10th Cir. 2008).

The cases cited in the Petition that find SLUSA inapplicable arise from factual allegations that are easily distinguished from those present here. *See, e.g., Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir.

2006) (consumer fraud action arising out of omissions allegedly made by defendant hired to perform certain "post-merger clean-up" services where the alleged omissions had "nothing" to do with any effort, plan, or scheme to purchase or sell securities or any failure to disclose "material" facts concerning securities transactions), *cert. denied*, 127 S.Ct. 1492 (Mar. 5, 2007); *LaSala v. Lloyds TSB Bank, PLC*, 514 F.Supp.2d 447 (S.D.N.Y. 2007) (allegations of "straight forward theft" and money laundering with no connection to a securities transaction); *Beary v. ING Life Ins. & Annuity Co.*, 520 F. Supp. 2d 356 (D. Conn. 2007) (complaint devoid of any allegations concerning misrepresentations or omissions); *Hughes v. LaSalle Bank, N.A.*, No. 02-CV-6384 (S.D.N.Y. Feb. 5, 2008) (same); *Burns v. Prudential Sec., Inc.*, 218 F. Supp. 2d 911 (N.D. Ohio 2002) (state law class action alleging that rogue stock broker and his employer committed wrongful acts that were independent and distinct from one another and not part of any scheme or plan to purchase or sell securities).

The most recent decision cited in the Petition finding SLUSA inapplicable to state law claims is even wider of the mark. *See LaSala v. Bordier et CIE*, 519 F.3d 121 (3d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3088 (U.S. Aug. 7, 2008) (No. 08-168). In *Bordier*, the Third Circuit was called upon to decide whether SLUSA applied to: (1) the state law claims of a bankrupt corporation being asserted by a trust created pursuant to a Chapter 13 reorganization plan; and (2) separate claims belonging to the bankrupt corporation's shareholders, arising under foreign anti-money laundering laws. In a decision based primarily on

SLUSA's express terms, the Third Circuit held that SLUSA did not preempt either set of claims.

The Third Circuit's conclusion that SLUSA was inapplicable to the state law claims of a bankrupt corporation was based squarely on SLUSA's plain language, which covers only those state law class actions that assert claims and damages directly "on behalf of more than 50 persons or prospective class members" and which further includes specific statutory exceptions expressly allowing courts to consider state law-based derivative actions as well as state law-based claims asserted by a bankruptcy trustee on behalf of a bankruptcy estate. *Id.* (quoting 15 U.S.C. §§ 78bb(f)(1), 78bb(f)(5)(B)(i), 78bb(f)(5)(C), and 78bb(f)(5)(D)). In a similar fashion, the Third Circuit's conclusion that SLUSA was inapplicable to claims arising under foreign anti-money laundering claims also flowed directly from SLUSA's plain language covering only those class actions "based upon the statutory or common law of any [s]tate or subdivision thereof." *Id.* (quoting 15 U.S.C. § 78bb(f)(1)).

Bordier, like the other cited cases, accordingly does not demonstrate any genuine conflict concerning the construction of SLUSA's "in connection with" language or the scope of SLUSA preemption. And it offers no basis for avoiding SLUSA preemption in this case. The *Bordier* Court did not have any occasion to construe SLUSA's statutory "in connection with" language; nor did it have any occasion to address *Dabit* or the majority of the other controlling legal precedents relied upon by the court below.

Bordier supports the decision of the court below by re-affirming the well-settled legal principle set forth in *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 299-300 (3d Cir. 2005), and other cases. Under those authorities, SLUSA extends to any class action claim that explicitly or implicitly includes predicate factual allegations concerning "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," even if the misrepresentation or omission is not a legal element of the claim. *Id.* Accordingly, where, as here, a plaintiff alleges a misrepresentation or omission of a material fact "in connection with" a securities transaction, the plaintiff cannot avoid SLUSA by arguing that misrepresentations and omissions are not an element of the legal claim. *Id.*

Indeed, the federal and state courts that have analyzed class action claims and allegations brought by trust beneficiaries in this context repeatedly have found Petitioners' arguments concerning *Gavin*, *LaSala*, *Saxton*, and the other cases cited in the Petition unavailing. *See, e.g., Wells Fargo Bank*, 159 Cal. App. 4th at 390-92.

Petitioners' amended complaint expressly alleges personal claims based on state law on behalf of a class of "thousands" of trust beneficiaries and further alleges that Petitioners were personally harmed as a direct result of misrepresentations and omissions in furtherance of an unlawful scheme to use trust assets to purchase mutual funds. *See* pp. 3-5, above (reviewing Petitioners' factual allegations). There is no basis to carve these kinds of allegations out of SLUSA. Rather, as every court that has

considered the matter has concluded, these kinds of allegations fit squarely within SLUSA.

II. The Decision Below Is Consistent With SLUSA's Text As Well As Federal Policy And Does Not Eliminate Any Historically Entrenched State Law Remedy.

Petitioners find themselves yet again at odds with SLUSA's plain language and recent controlling precedent from this Court and others when they argue that the decision below eliminates a historically entrenched state law remedy, interferes with substantive provisions of state trust law, and contravenes principles of federalism. Pet. 20-24.

To begin with, Petitioners' argument disregards SLUSA's plain language, as well as the intent of Congress in enacting the statute. SLUSA broadly extends to class actions brought by "any private party" who "alleg[es]" either a "misrepresentation or omission of a material fact" or the use of a "deceptive" contrivance or scheme "in connection with" the purchase or sale of a covered security. 15 U.S.C. § 78bb(f) (emphasis added). The breadth of the statutory language lays to rest Petitioners' claim that the opinion below somehow "eliminated" a historically entrenched state law remedy when it dismissed Petitioners' class action.

In addition, while SLUSA contains a number of specific exceptions, there are none for state trust law claims, or for actions brought against a trustee for wrongful acquisition of mutual funds, or for a trustee's alleged breach of fiduciary duties in the purchase of mutual funds. Moreover, as this Court

explained in *Dabit*, Congress's inclusion of specific exceptions means that no further exceptions should be implied. *Dabit*, 547 U.S. at 87-88. Thus, the fact that Plaintiffs have alleged trust law claims does not provide grounds for a free pass to escape SLUSA. This is the very point of SLUSA—to preclude the use of state law claims to avoid application of the PSLRA. *See Horattas v. Citigroup Financial Markets Inc.*, No. 1:07-CV-122, 2007 WL 2702704, at **8-9 (W.D. Mich. Sept. 12, 2007) (the presence of allegations against trustee of imprudent investment and breach of duty as prudent investor cannot help a plaintiff "escape the broad preemptive bar of SLUSA").

The federalism concerns Plaintiffs raise concerning SLUSA's broad construction also were considered and rejected in *Dabit*, 547 U.S. at 87-88, where this Court held that concerns about federal law displacing one category of state law class actions could not be relied on to narrow SLUSA's preemptive reach. In this regard, *Dabit* made the telling observation that "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims [on behalf of a group of 50 plaintiffs or more]." 547 U.S. at 87. Furthermore, *Dabit* noted that federalism concerns are weak here because "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Id.* at 88 (citing legislative history). While state law breach of fiduciary claims concerning securities transactions theoretically were available before SLUSA, there is nothing to suggest that nationwide class action claims involving trust accounts and the purchase of mutual fund shares

were commonplace. As the *Dabit* Court aptly put it, "[t]his is hardly a situation, then, in which a federal statute has eliminated an historically entrenched state-law remedy." *Id.*

Finally, given its narrow preemptive effect, enforcement of SLUSA preemption does not, as Petitioners suggest, leave any would-be plaintiff without a remedy. Those plaintiffs who have a bona fide federal securities claim are free to bring those claims consistent with the requirements of controlling law. Alternately, SLUSA preempts only those state law claims that are related to securities transactions and that are brought as class actions. To be a "covered class action" under SLUSA, an action must either seek damages by a named plaintiff on behalf of a class, or be asserted by more than fifty people. *See* 15 U.S.C. § 78bb(f)(5). SLUSA thus does not preempt an individual's state law remedies for alleged violations of disclosure obligations with respect to investments. It is only large class action lawsuits that Congress sought to rein in by requiring plaintiffs to assert them under federal law using federal pleading standards. *Saxton*, 494 F.3d at 843-45 (noting that SLUSA does not preempt any substantive state law or deprive any individual of a remedy; rather, SLUSA simply restricts the use of the class action "procedural device").

CONCLUSION

The decision below does nothing more than provide a well-reasoned and thoughtful addition to a uniform body of case law following this Court's recent controlling decision in *Dabit*. Accordingly, the Petition is without merit and should be denied.

Respectfully submitted,

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